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IN THE

Supreme Court of the United States

No. 796

UNITED STATES OF AMERICA, RUSSELL C. HARRINGTON,
Commissioner of Internal Revenue,
Respondent,

v.

RAYMOND COHEN
and
LOCAL 107, HIGHWAY TRUCK DRIVERS AND HELPERS UNION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner

Petition for Writ of Certiorari to United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "Local 107" or "Union") pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the District Court (Appendix 56a) is unreported. The opinion of the Court of Appeals (Appendix, infra, p. 11) is reported at F. 2d . (Not reported at the time of this printing.)

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1959 (Appendix, infra, p. 18). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1) and 11 U.S.C. 47.

QUESTIONS PRESENTED

Whether the Commissioner of Internal Revenue is entitled to judicial enforcement of a Summons for the production of documents when the documents are not in the possession of the defendants, when the defendants themselves have taken legal action to secure the return of the documents, when the defendants have assured the Commissioner of Internal Revenue that they will comply with the Summons as soon as the books and records are rightfully returned to their possession and control and when the defendants would be deprived of their constitutional guarantee of "due process of law" if the Summons were enforced.

STATUTES INVOLVED

Title 26 U.S. Code, Sec. 501(c)(5) (Appendix, infra, p. 20).

Title 26, U.S. Code, Sec. 7402(a) and (b) Appendix, infra, p. 20).

Title 26 U.S. Code, Sec. 7602 (Appendix, infra, p. 21).

Title 26 U.S. Code, Sec. 7604 (Appendix, infra, p. 22).

Title 29 U.S. Code, Sec. 159(f) (Appendix, infra, p. 23).

STATEMENT OF THE CASE

On May 2, 1958, the District Director of Internal Revenue issued and served upon Local 107 and Raymond Cohen, its Secretary-Treasurer, a Summons requiring an appearance before a special agent of the District Director and requiring the production of certain records and other financial information of the Union for the years 1947 to 1957 inclusive. Local 107 advised the District Director and his special agent that Local 107 was unable to comply with the Summons because its books and records were in the possession of the Senate Select Committee on Improper Activities in the Labor and Management Field (50a, 51a). The District Director was further advised to contact Local 107 in order to discuss "means and methods of possible compliance" when it became possible for Local 107 to comply (51a).

On May 26, 1958, Mr. Raymond Cohen, Secretary-Treasurer of Local 107, did appear in response to the Summons and did make available to the District Director of Internal Revenue certain records which were in the possession of Local 107 (4a). He was unable to supply the remainder of the books and records sought because they were in the possession of the aforesaid Senate Committee (4a, 5a). The District Director of Internal Revenue requested Raymond Cohen to execute an authorization enabling the Senate Committee to deliver the books and records of Local 107 directly to the Internal Revenue Service without returning them to their rightful owner. Defendants refused to execute such authorization preferring to exercise their legal right of having the books and records returned to them before being required to comply with the Summons of the District Director of Internal Revenue.

On September 3, 1958, the Commissioner of Internal Revenue began the instant action alleging that this was an action of a civil nature "to enforce a Summons" (3a). The Complaint did not allege any refusal to comply with the Summons and, in fact, the Answer alleged a willingness to comply (9a). The Complaint sought an injunction restraining the defendants from receiving their own books and records from the Senate Committee and requiring the defendants to execute an authorization to allow the Senate Committee to deliver the books and records directly to the Internal Revenue Service (5a, 6a). The Answer denied the validity of the Summons, denied the propriety of the relief sought and, inter alia, alleged that the Summons was invalid because it sought books and records antedating the Statute of Limitations (8a-10a).

Nine months prior to the institution of the present proceeding, in January of 1958, Local 107 had instituted suit in the United States District Court for the District of Columbia against John L. McClellan, Chairman of the Senate Select Committee on Improper Activities in the Labor and Management Field, to recover the books, records and documents held by the Senate Committee by virtue of a subpoena duces tecum.[1] The basis of the relief requested was that the Committee had no further need for the documents requested. In this proceeding before the District Court for the District of Columbia, the plaintiff in the instant case, i.e., the Commissioner of Internal Revenue, presented a Motion to Intervene along with a Petition for the Enforcement of an Administrative

[1] *Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. John D. McClellan, et al.*, Civil Action 188-58, U. S. District Court for the District of Columbia.

Summons which sought the same relief as plaintiff seeks herein. The Court in the District of Columbia denied the Motion to Intervene.

After argument on the Commissioner of Internal Revenue's Motion for a Preliminary Injunction, at which time the government produced absolutely no evidence whatsoever, the District Court entered an order granting the Internal Revenue Service the right to examine, inspect, copy and photograph the books and records of Local 107 and, in addition, enjoining Raymond Cohen and Local 107 from removing or causing to be removed the said records and documents belonging to Local 107 from the custody of the Senate Committee.[2]

The Court of Appeals for the Third Circuit modified the order of the District Court by inserting in the second paragraph thereof the fact that the Senate Committee, in whose possession the books and records are, had consented to the order. The Court of Appeals also modified the order of the District Court by enjoining Local 107 and Raymond Cohen from interfering with or preventing the Commissioner of Internal Revenue or the Internal Revenue Service from examining the books and records in the hands of the Senate Committee.

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[2] The order of the District Court was entered without [illegible] timony or evidence being presented to it as to the validit[illegible] Summons or in support of the Commissioner of Internal R[illegible] contentions. The issuance of the order by the District Co[illegible] not comply with the provisions of Rule 65 of the Federal Rule[illegible] Civil Procedure.

REASONS FOR GRANTING THE WRIT

1. The Order of the court below contravenes and misapplies the purpose of Section 7402(a) of Title 26 of United States Code which empowers any District Court of the United States "to compel" attendance, testimony or production of books and records. This power of compulsion may be invoked only in those instances where there has been a deliberate refusal to comply with a request of the District Director of Internal Revenue. Cf. *Matter of Tax Liability of Civil Rights Congress et al.*, 124 F. Supp. 68 (S.D.N.Y., 1954).

In the instant case, there has been no such refusal but, quite to the contrary, the defendants have produced all the books and records in their possession and have assured the District Director of Internal Revenue that they will comply with what they are required to do as soon as it becomes possible for them to do so, to wit, when the records presently in the possession of the Senate Select Committee on Improper Activities in the Labor and Management Field are once more returned to the possession of the defendants herein.

This problem is at the heart of this entire case. In September, 1957, the Senate Committee subpoenaed the books and records of Local 107. In January, 1958, Local 107 began suit in the District Court of the District of Columbia for the return of its records. *Local 107 et al. v. McClellan et al.*, supra. There is no contradiction that the Senate Committee has completed its use of the records (48a-50a).[3]

[3] The letter of Senator McClellan to the United States Attorney states that the Senate Committee has completed its investigation

Since the Senate Committee has concluded its examination of the books and records, there is no reason why they should not be returned to their rightful owner. Documents, records or papers produced in response to a subpoena duces tecum remain the property of the person who produces them and must be returned upon completion of their use. *United States v. Wallace and Tiernan Co.*, 326 U. S. 793, 850 (1949); *Traub v. United States*, 226 F. 2d 781 (D.C. Cir., 1955); *Application of Bendix Aviation Corp.*, 58 F. Supp. 953, 954 (S.D. N.Y., 1954).

The difficulty in this entire case arises from the refusal of the Senate Committee to return the books and records, for which it has no use, to their rightful owner. The District Court for the District of Columbia has refused to entertain the plaintiff's motion for summary judgment in Local 107's suit against the Senate Committee, pending the outcome of this case.[4] There is absolutely no basis or justification for the refusal of the Senate Committee to return these documents to Local 107 from whom they were subpoenaed.[5]

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and is awaiting a determination of the court as to a disposition of the records (49a). The Court of Appeals states that this letter "was offered and received in evidence without objection." (Appendix, infra, p. 15). This statement is not supported by the record which discloses that strenuous objection was made to the receipt of the document (25a, 26a) and it was received only for the purposes of assuring the District Judge that he would not be "discourteous" if he proceeded in this case and for no other reason (28a).

[4] By Order of July 21, 1958, Judge Richmond Keech of the United States District Court for the District of Columbia denied the defendants' motion to dismiss in that case.

[5] Local 107 has a valid need for its books and records for the year 1957 because of its inability to file its tax returns (Form 990) required by the Internal Revenue Code, 26 U.S. Code 501(c)(5) and because of its inability to comply with Section 9(f) of the Labor Management Relations Act of 1947, 29 U.S. Code 159(f).

2. It is well settled that a subpoena duces tecum requires no more than the production by the witness of those documents which he has in his possession and control. *U. S. v. Bryan*, 339 U. S. 323 (1950); *Traub v. U. S.*, 232 F. 2d 43 (D.C. Cir., 1955); *U. S. v. Patterson*, 219 F. 2d 659 (2nd Cir., 1955); *In Re Rivera*, 79 F. Supp. 510 (S.D.N.Y., 1948). The books and records sought by the District Director in the instant proceeding and which are presently in the possession of the Senate Committee are neither in the possession nor the control of the defendants in this case; witness their attempt in the District Court for the District of Columbia to secure a return of the same. Moreover, in view of the fact that defendants have at no time stated any unwillingness to comply, it is most difficult to ascertain any valid basis for the relief allowed by the court below.

There is no justification in the record for the issuance of any Order by the District Court. The Government failed to introduce one iota of evidence to justify the Order. There was no testimony either to establish non-compliance or to prove that the books and records might be lost, destroyed or tampered with if they were returned to their rightful owner.

The Order of the District Court, as affirmed by the Court of Appeals, circumvents the normal processes which the Government is required by law to take to enforce a Summons. Not only does the Order fail to consider the lack of non-compliance, but it deprives Local 107 of any right it might have to object to the production of the documents covered by the Summons. Local 107's Answer in this case raises certain legal objections to the validity of the Summons, and to the authority of the court to proceed under Sections 7402 and 7604 of Title 26 U.S.C. (8a, 9a). The Answer also raises the defense that the Summons on

which the Complaint is based seeks books and records antedating the period of the statute of limitations (10a).

These defenses to the Summons, like Local 107's defenses to the Complaint, were never considered or passed upon by the District Court or the Court of Appeals. The effect of the Government's Complaint is to deprive the defendants who do not have possession of the subpoenaed documents of any rights they might possess to object to the production of the documents on the grounds of privilege, relevancy, passage of the statute of limitations or others, with the consequent right to have such refusal tested in a federal court.

The Government is attempting to enforce a Summons when the defendants do not have possession of the documents subpoenaed. This lack of possession should not deprive the defendants of their right to raise proper objections to the sufficiency of the Summons. The documents and books and records should be returned to Local 107 and the Commissioner of Internal Revenue should be permitted to seek enforcement of his Summons at that time.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix "A"

OPINION OF THE COURT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,754

UNITED STATES OF AMERICA, RUSSELL C. HARRINGTON, Commissioner of Internal Revenue,

v.

RAYMOND COHEN, LOCAL 107 HIGHWAY TRUCK DRIVERS AND HELPERS UNION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Appellants.*

Appeal from the United States District Court for the Eastern District of Pennsylvania.

Argued January 20, 1959

Before GOODRICH and HASTIE, *Circuit Judges*, and EGAN, *District Judge.*

(Filed February 18, 1959)

By EGAN, *District Judge.*

This is an appeal from an order of the United States District Court for the Eastern District of Pennsylvania granting the Commissioner of Internal Revenue the right

to inspect, examine, copy and photograph books and records of the defendant union and enjoining the union and the defendant, Cohen, secretary-treasurer, from accepting and removing the books and records from the custody of a Senate Committee having possession of them until further order of the Court.

Jurisdiction is based on Sections 7602, 26 U.S.C.A. and 7402(a), 26 U.S.C.A. of the Internal Revenue Code of 1954.[1]

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[1] The pertinent provisions of the Code are as follows:

Ti. 26 U.S.C.A. §7402 (I.R.C. 1954) JURISDICTION OF DISTRICT COURTS:

"(a) TO ISSUE ORDERS, PROCESSES, AND JUDGMENTS.—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

"(b) TO ENFORCE SUMMONS.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

Ti. 26 U.S.C.A. (I.R.C. 1954) §7602—EXAMINATION OF BOOKS AND WITNESSES:

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

Pursuant to Section 7602 of the Code, the Commissioner, who was investigating the tax status of the union covering the period 1947 through 1957, served an admin-

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(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry. Aug. 16, 1954, 9:45 a.m. E.D.T., c. 736, 68A Stat. 901."

§7604—ENFORCEMENT OF SUMMONS:

"(a) JURISDICTION OF DISTRICT COURT.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

"(b) ENFORCEMENT.—Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

istrative summons on the union by serving a copy thereof on the defendant, Cohen, requiring him to appear before an officer of the Internal Revenue Service at the United States Courthouse, Philadelphia, Pennsylvania, to give testimony relating to the tax liability of the union and to bring with him the books and records listed in the summons.

Cohen and the Union did produce or make available to the Internal Revenue Service all the requested books and records which were then in his possession and explained that he could not produce those for the period January 1, 1950 through September 26, 1957, because they were then and still are in the possession of the Senate Select Committee on Improper Activities in the Labor or Management Field of the United States Senate (hereinafter called Senate Committee).[2]

The union and Cohen were then advised by letter that the Commissioner would deem the summons sufficiently complied with if the union would issue a letter addressed to the Commissioner, or the Senate Committee, authorizing the delivery of the books and records to the Internal Revenue Service upon the termination of the Committee's use thereof. This the union and Cohen, acting by their counsel, respectfully declined to do in so many words, although their language is equivocal.

Thereafter the Commissioner caused this suit to be brought in the District Court to enforce compliance under the above provisions of the Internal Revenue Code.

The complaint recites the facts in substantially the same form as related above. The defendants accepted service, filed a joint answer and new matter in which they stated in paragraph 13, "Defendants have neither neglected

[2] The wanted books and records are stored in Philadelphia under control of the Committee.

nor refused to obey the summons heretofore issued. They have in fact expressed their willingness to comply when compliance becomes possible." A similar statement appears on page 5 of their brief on appeal.

The cause came on for hearing on complaint, answer and affidavits before the District Court on plaintiff's motion for a preliminary injunction. At the hearing before Judge Welsh, there was offered and received in evidence without objection, as plaintiff's exhibit No. 3, a letter from United States Senator James L. McClellan, Chairman of the Senate Committee, addressed to Government's counsel, reading in pertinent part as follows:

> "In reply to your letter of September 18, 1958 regarding pending proceedings to compel Mr. Raymond E. Cohen and Local 107 of the Teamsters to turn over to the Government certain of its books and records, you point out that Judge Welsh desires some indication from this Committee whether a ruling would be considered or interpreted as an interference with the proper functions of Congress.
>
> * * * *
>
> I deem it in the best interests of the rank and file members of this local, as well as in the best interests of the country, that the books and records of Local 107 be preserved intact and that the records now in the possession of the Committee be turned over to the Internal Revenue Service by order of the Court. Such ruling by the Court would be considered by the Committee Chairman clear cooperation between the Legislative, Executive, and Judicial branches of the Government and such ruling would, in the Chairman's opinion, in no wise impinge upon or interfere with the proper functions of Congress."

At the conclusion of the hearing, Judge Welsh entered an order which reads in pertinent part as follows:

> "IT IS THEREFORE ORDERED, pursuant to the authority granted to the Court by Sections 7402 and 7602 of Title 26, that the Internal Revenue Service shall have the authority and is hereby granted the right to examine, inspect, copy and photograph the books and records of Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and
>
> "IT IS FURTHER ORDERED that the aforesaid Raymond Cohen and Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its agent or representative, shall not remove or cause to be removed the aforesaid records and documents from the custody of the Committee until further order of the Court."

The Senate Committee having consented to the entry of an appropriate order giving the Committee authority to turn over the books and records of defendants to the Internal Revenue Service, or giving the latter access to them for the purposes stated, we believe that the order should be modified to conform to the record; further that the defendants be restrained from interfering with or preventing the plaintiff's examination, copying and photographing the said books and records in the hands of the Committee. Thereafter the Senate Committee consenting, the defendants are entitled to have their books and records returned to them.

The applicable law seems to be clear.

Section 7402(a) of the Code gives District Courts jurisdiction "to render such judgments and decrees as may be necessary or appropriate for the enforcement of the Internal Revenue laws."

Under Section 7602 of the Code, the Secretary or his delegate, the Commissioner of Internal Revenue, is authorized to examine any books, papers, etc., which may be relevant to a tax inquiry. This right is in addition to the right to summon the person liable for the tax to present the books of account before the Secretary or his delegate for examination. He certainly has the right to examine the books of the taxpayer himself "wherever they are found." We can see no reason why he cannot examine the books in the possession of the Senate Committee, the latter being agreeable.

Appellants also argue that this matter is res judicata because they brought an action in replevin in the District Court of the District of Columbia[3] against the Senate Committee for the return of the union's books and records. The Commissioner sought to intervene and the Court denied his petition. This was not an adjudication on the merits and does not bar another appropriate form of proceeding. *Kennedy et al., v. Bethlehem Steel Co.*, 102 F. 2d 141 (C.A. 3, 1939).

Appellants further contend that since the union is tax exempt under Section 501(c)(5) of the Code, the Commissioner lacks authority to examine its books and records and to make copies and photographs thereof. As a matter of law, the union is obliged to file returns of withholding and other forms of tax under pain of criminal penalties.[4]

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[3] *Local 107, etc., v. McClellan, et al.*, U.S.D.C., D.C., Civil Action 188-58.

[4] As a labor union, Local 107 must deduct the F.I.C.A. (Social Security) tax on wages paid to employees (Section 3102). It must pay the F.I.C.A. tax imposed on employers (Section 3111). It must

Certainly the Commissioner is entitled to check the returns of taxpayers against such union returns. The contention lacks merit.

We think that the Court would be justified in doing everything possible to help the Commissioner make an examination of the books and records for the purpose of enforcing the Revenue laws. The effect of the order of the District Court is to facilitate the examination of the records and make them physically available.

Appellants argue that the effect of the lower Court's order is to deny them any right to object to the summons on the grounds of irrelevancy or the running of the statute of limitations, etc. However, this seems inconsistent with their claim that the sole reason for the failure to produce is one of physical impossibility.

The order of the District Court will be affirmed, subject to modification of the second and third paragraphs of the order, to read as follows:

> "IT IS THEREFORE ORDERED, the Senate Select Committee on Improper Activities in the Labor or Management Field having consented, pursuant to the authority granted to the Court by Sections 7402 and 7602 of Title 26, that the Internal Revenue Service shall have the authority and is hereby granted the right to examine, inspect, copy and photograph the books and records of Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of

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pay the F.U.T.A. (unemployment) tax imposed upon employers (Section 3301). It must withhold income taxes from wages paid to employees (Section 3402) and is liable for the payment of such tax (Section 3403). It must file information returns required of exempt organizations (Section 6033). It must file information returns respecting payments (Section 6041). It must account for taxes withheld from wages (Section 6051). It is subject to criminal penalties for wilful failure to file required returns, and for the filing of false and

Teamsters, Chauffeurs, Warehousemen and Helpers of America, and

"IT IS FURTHER ORDERED that the aforesaid Raymond Cohen and Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its agents and representatives, are hereby enjoined from interfering with or preventing the Commissioner of Internal Revenue, or the Internal Revenue Service, from examining the books and records in the hands of said Committee until further order of Court."

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix "B"

INTERNAL REVENUE CODE OF 1954

[26 U.S.C. §501(c)(5)]

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

* * * * * *

(c) *List of Exempt Organizations.*—The following organizations are referred to in subsection (a)

* * * * * *

(5) Labor, agricultural, or horticultural organizations.

* * * * * *

[26 U.S.C. §7402(a) and (b)]

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(a) *To Issue Orders, Processes, and Judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by

appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * * *

[26 U.S.C. §7602]

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inequity;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

* * * * *

[26 U.S.C. §7604]

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) *Enforcement.*—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

LABOR-MANAGEMENT RELATIONS ACT, 1947, as amended

[29 U.S.C. §159(f)]

SEC. 9 . . .

* * * * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and by-laws and a report, in such form as the Secretary may prescribe showing —

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has —

(1) filed with Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the source of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

FILE COPY

APR 2

No. 796

In the Supreme Court of the United States

OCTOBER TERM, 1958

RAYMOND COHEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, RUSSELL C. HARRINGTON, COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (Pet. 11-19) is reported in 263 F. 2d 466.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1959. (Pet. 11, 18.) The petition for a writ of certiorari was filed on March 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the books and records of a union, relevant to an investigation of its tax status over an 11-year period, could be examined under the summons provisions of the 1954 Internal Revenue Code even though they were in the physical possession of a Senate Committee, where the Committee had given its consent to such procedure.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 13-15.

STATEMENT

On May 2, 1958, a summons issued pursuant to Section 7602 of the Internal Revenue Code of 1954 was served upon Raymond Cohen, secretary-treasurer of Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as the Union) requiring Cohen to appear before an officer of the Internal Revenue Service at the United States Courthouse, Philadelphia, Pennsylvania, to give testimony relating to the tax liability of the Union and to bring with him the books and records listed in the summons. The Commissioner of Internal Revenue at that time was investigating the tax status of the Union covering the period 1947 through 1957. (Pet. 13-14; R. 3a, 4a, 8a)[1]

[1] References designed "R" are to the appendix to appellant's brief in the Court of Appeals.

Cohen and the Union did produce and make available to the Service all the requested books and records which were then in his possession, explaining that he could not produce those for the period January 1, 1950, through September 26, 1957, because they were then (and at the time of the proceedings below still were) in the possession of the Senate Select Committee on Improper Activities in the Labor or Management Field of the United States Senate (hereinafter called the Committee).[2] (Pet. 14.)

The Union and Cohen were then advised by letter that the Commissioner would deem the summons sufficiently complied with if the Union would issue a letter addressed to the Commissioner or the Committee, authorizing the delivery of the books and records to the Service upon termination of the Committee's use thereof. The Union and Cohen, acting through counsel, in effect respectfully declined to issue such a letter.[3] (Pet. 14.)

Thereafter, the Commissioner instituted suit in the United States Court for the Eastern District of Pennsylvania to enforce compliance with the summons. The complaint (R. 3a-6a) recited the facts substantially as related above. The answer, among other things, averred that Cohen and the Union "neither neglected nor refused to obey the summons

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[2] The books and records in question were stored in Philadelphia under the control of the Committee. (Pet. 14.)

[3] As conceded in their brief below (p. 3), Cohen and the Union "preferred to exercise their legal rights to have the books and records returned to their possession prior to turning them over to the Internal Revenue Service and declined to execute such an authorization * * *".

heretofore issued * * * [but] have in fact expressed their willingness to comply when compliance becomes possible". (Pet. 14-15; R. 9a.)

The cause came on for hearing on complaint, answer, and affidavits before the District Court on motion of the United States for a preliminary injunction.[4] At the hearing before Judge Welsh, a letter from United States Senator James L. McClellan, Chairman of the Committee, addressed to counsel for the Government, was offered and received in evidence without objection. Part of the letter reads as follows (Pet. 15):

> In reply to your letter of September 18, 1958 regarding pending proceedings to compel Mr. Raymond E. Cohen and Local 107 of the Teamsters to turn over to the Government certain of its books and records, you point out that Judge Welsh desires some indication from this Committee whether a ruling would be considered or in-

[4] The motion sought, for the following reasons, to enjoin Cohen and the Union from receiving the books and records of the Union from the Committee in the event they were tendered by the Committee: (1) that the verified complaint previously filed with the District Court sought a mandatory injunction against Cohen requiring the execution of an authorization to permit the Committee to deliver the books and records in question directly to the Service, or requiring the Union to transmit the requested material to the Service immediately upon the Union's receipt of them from the Committee; (2) that the complaint had set forth adequate allegations requiring production of the books and records, and that there had been no compliance with the summons; and (3) that the United States and the Commissioner feared "that the information contained in the books and records sought might be lost, destroyed or tampered with * * *" (R. 6a-7a.)

terpreted as an interference with the proper functions of Congress.

* * * *

I deem it in the best interests of the rank and file members of this local, as well as in the best interests of the country, that the books and records of Local 107 be preserved intact and that the records now in the possession of the Committee be turned over to the Internal Revenue Service by order of the Court. Such ruling by the Court would be considered by the Committee Chairman clear cooperation between the Legislative, Executive, and Judicial branches of the Government and such ruling would, in the Chairman's opinion, in no wise impinge upon or interfere with the proper functions of Congress.

At the conclusion of the hearing, Judge Welsh entered an order which, in part, provided as follows (Pet. 16):

IT IS THEREFORE ORDERED, pursuant to the authority granted to the Court by Sections 7402 and 7602 of Title 26, that the Internal Revenue Service shall have the authority and is hereby granted the right to examine, inspect, copy and photograph the books and records of Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and

IT IS FURTHER ORDERED that the aforesaid Raymond Cohen and Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its agent or representative, shall not remove or cause to be re-

moved the aforesaid records and documents from the custody of the Committee until further order of the Court.

On appeal, the Court of Appeals concluded that since the Committee in effect had consented to the entry of an appropriate order giving it authority to turn over the Union's books and records to the Service, or giving the Service access to them for the stated purposes, the District Court's order should be modified to conform to the record, and further, that Cohen and the Union should be restrained from interfering with or preventing the Service's examination, copying, and photographing the books and records in the hands of the Committee.[5] (Pet. 16.) Accordingly,

[5] Thereafter, in the view of the Court of Appeals, Cohen and the Union would be entitled to have the books and records returned to them. (Pet. 16.) In this connection, it may be appropriately noted here that the Union had previously brought an action in replevin in the United States District Court for the District of Columbia against the Committee for the return of the Union's books and records (*Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *McClellan, et al.*, Civil Action 188-58). The Commissioner sought to intervene therein in order to enforce compliance with the summons (R. 52a-54a); the motion to intervene was denied (R. 55a). A final decision on the merits in the replevin suit has not yet been handed down. The Court of Appeals in the instant case held that the denial of the motion to intervene was not, as the petitioners contended below, an adjudication on the merits with respect to the issue here involved. (Pet. 17.) On January 26, 1959, this Court denied (358 U.S. 947) a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the District Court's denial of a prelim-

it affirmed the order of the District Court, subject to modification of the second and third paragraphs thereof, to read as follows (Pet. 18-19):

> IT IS THEREFORE ORDERED, the Senate Select Committee on Improper Activities in the Labor or Management Field having consented, pursuant to the authority granted to the Court by Sections 7402 and 7602 of Title 26, that the Internal Revenue Service shall have the authority and is hereby granted the right to examine, inspect, copy and photograph the books and records of Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and
>
> IT IS FURTHER ORDERED that the aforesaid Raymond Cohen and Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its agents and representatives, are hereby enjoined from interfering with or preventing the Commissioner of Internal Revenue, or the Internal Revenue Service, from examining the books and records in the hands of said Committee until further order of Court.

ARGUMENT

In holding that Internal Revenue Service personnel investigating "the tax status of the union covering

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inary injunction to restrain the Committee from authorizing or permitting the District Attorney for Philadelphia County, State of Pennsylvania, to inspect, examine, and copy records of Local 107, pursuant to a subpoena *duces tecum* issued by the Committee.

the period 1947 through 1957" (Pet. 13) could examine books and records of Local 107 which were in the custody of the Senate Committee, the decisions below properly implement statutory provisions which permit the Secretary or his delegate, through the issuance of a summons, "To examine any books, papers, records, or other data which may be relevant or material to such inquiry" (Section 7602 of the Internal Revenue Code of 1954, Appendix, *infra*), and which bestow upon the District Courts not only the general power "to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws" (Section 7402(a) of the Internal Revenue Code of 1954, Appendix, *infra*), but also the specific power, where a summons has been issued, "by appropriate process to compel * * * production of books, papers, or other data" (Section 7402(b) of the Internal Revenue Code of 1954, Appendix, *infra*) and "to enforce obedience to the requirements of the summons" (Section 7604(b) of the Internal Revenue Code of 1954, Appendix, *infra*). Such powers are to be broadly construed in the light of the important objects sought to be achieved. *Falsone* v. *United States*, 205 F. 2d 734, 742 (C.A. 5th), certiorari denied, 346 U.S. 864; cf. *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322. Indeed, as the Court of Appeals for the First Circuit stated in *Brody* v. *United States*, 243 F. 2d 378, 384, certiorari denied, 354 U.S. 923, in considering the same provisions, "It would be difficult to find language more clearly manifesting a congressional intention to provide the district courts with a full arsenal of powers

to compel compliance with the internal revenue laws".

The books and records sought to be examined in the instant case were germane to the investigation undertaken by the Service.* No constitutional question was seriously raised below, and clearly the investigation was not "out of proportion to the end sought." *Zimmermann* v. *Wilson*, 105 F. 2d 583, 585 (C.A. 3d). In fact, as the Court of Appeals stated, the Union and Cohen had claimed below that the "physical impossibility" of complying with the summons was the "sole reason for the failure to produce." (Pet. 18.) But the petitioners could have complied if, as requested, they had executed an "authorization • • • to enable the Committee to deliver the books and records to the Internal Revenue Service upon the termination of its use." (R. 5a.) In any event, the Senate Committee itself had eliminated any question as to the availability of the material sought by acknowledging, in effect, that it was amenable to the entry of an order "giving the Committee authority to turn over the books

* Paragraph XII of the complaint alleged "that the books and records currently in the control of the Committee are necessary for this investigation." (R. 5a.) Paragraph 12 of the Answer "Admitted" the allegation, noting, however, "that inasmuch as the Union is a tax-exempt organization • • • it has no tax liability subject to investigation." (R. 9a.) But whether it was such an organization was in itself a proper subject of investigation (cf. *Application of United States (Carroll)*, 246 F. 2d 762 (C.A. 2d), certiorari denied, 355 U.S. 857); and, as the Commissioner alleged in his attempt to procure enforcement of the summons in the intervention proceedings in the District of Columbia, he was "investigating the tax-exempt status of the plaintiff labor union covering the period of 1947 through 1957." (R. 52a.)

and records of defendants to the Internal Revenue Service, or giving the latter access to them for the purposes stated." (Pet. 16.) In this state of the facts, the case before the District Court was in substance not materially distinguishable from the fairly conventional situation in which books and records of an individual or corporation, in the possession of a third party, are regularly subjected, without question, to the reach of an Internal Revenue summons requiring their production in connection with a tax investigation of the owner of the books and records.[7]

Contrary to their view concerning "the heart of this entire case" (Pet. 6), petitioners, both in sub-

[7] Given the right of the Service to examine the records of the Union which were in the custody of the Senate Committee, it follows that the injunction issued below was fully warranted. The motion for a preliminary injunction alleged that there was "fear that the information contained in the books and records sought might be lost, destroyed or tampered with" (R. 7a). Basis for the apprehension may be found in the affidavit of the Federal Bureau of Investigation handwriting expert (R. 41a-48a) who found certain alterations and changes in the records of the union which were before the Senate Committee. In addition, Senator McClellan's letter to the United States Attorney, Plaintiff's Exhibit No. 3 before the District Court (R. 48a-50a), in expressing the view that it was "in the best interests of the rank and file members of this local, as well as in the best interests of the country, that the books and records of Local 107 be preserved intact and that the records now in the possession of the Committee be turned over to the Internal Revenue Service by order of the Court", pointed out, among other things, that "[d]uring the course of our hearings there were strong indications of misuse and manipulation of union funds"; that there was "evidence that some checks had been forged"; and "that certain records and checks were missing and unaccounted for."

stance and effect, did refuse to comply with the summons when, as the Court of Appeals stated (Pet. 14), "acting by their counsel, [they] respectfully declined * * * in so many words, although their language is equivocal", to execute the requested authorization. Also, contrary to petitioners' contention (Pet. 8), they did have sufficient "control" to cause compliance with the summons because they could have effected the transfer of the books and records from the Committee to the Service by executing the requested authorization. Cf. *Grant Foster & Foster Construction C.A.* v. *United States*, decided March 16, 1959 (C.A. 2d).

Nor, as petitioners further assert (Pet. 9), did the District Court's order, as modified below, deprive them of the right "to raise proper objections to the sufficiency of the Summons." As noted above, the Court of Appeals regarded this contention as "inconsistent" with petitioners' sole claim in the District Court. (Pet. 18.) Moreover, both courts below presumably found ample warrant in the record to support the conclusion that the books and records were necessary to the inquiry; and, as to the statute of limitations, if the anticipated investigation revealed that fraud had been perpetrated, the running of the statute of limitations would be barred as a defense in any subsequent action. "The Commissioner is * * * entitled to the examination if it may shed light on whether a liability still exists or whether it has been time-barred." *Grant Foster & Foster Construction C.A.* v. *United States, supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL, 1959

APPENDIX

Internal Revenue Code of 1954:

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(a) *To Issue Orders, Processes, and Judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 7402.)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any

person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data; and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 1952 ed., Supp. V, Sec. 7602.)

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance,

testimony, or production of books, papers, records, or other data.

(b) [as amended by Sec. 4(i), P. L. 466, 70 Stat. 87, and Sec. 208(d)(4), Highway Revenue Act of 1956, 70 Stat. 387] *Enforcement.*—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 7604.)

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